IN RE AZHAR AZIZAN HARUN

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[PETITION NO: S2-32-123 OF 1998]
4 DECEMBER 1998

SUCCESSION: *Probate - Resealing of grant - Petition in the name of donee of power of attorney - Whether petition wrongly filed - Whether ought to be in the name of executor - Probate and Administration Act 1959, s. 52*

SUCCESSION: *Probate - Resealing of grant - Application by attorney of executor - Procedure applicable - Rules of the High Court 1980 silent on the matter - Form 168 of Rules and procedure prior to coming into effect of Rules allow petition to be in name of attorney as does English procedure - Prior procedure repealed by Rules and English procedure not incorporated here - Rules of the High Court 1980, O. 71, O. 72, O. 1 r. 7 - Non-Contentious Probate Rules 1987 of UK - Probate and Administration Rules 1961, r. 6(2)*

AGENCY: *Authority of agent - Power of attorney - Title of action brought by attorney on behalf of principal - Whether it can indicate existence of power of attorney*

AGENCY: *Authority of agent - Power of attorney - Whether and when attorney can affirm affidavit on behalf of principal*

SUCCESSION: *Probate - Resealing of grant - Difference between application for resealing and application for limited grant to attorney as administrator - Rules of the High Court 1980, O. 71 r. 26.*

This was a petition for resealing a grant of probate pursuant to s. 52 of the Probate and Administration Act 1959. The petitioner, acting under a power of attorney given by the executrix for this very purpose, filed a petition under his name as attorney of the executrix.

The main issue which arose was whether the petition was incorrectly filed in that it ought to have been filed in the name of the executrix. The petitioner contended that since there was no specific provision relating to an application for resealing in the Rules of the High Court 1980 ('RHC'), the procedure applicable prior to the coming into force of the RHC should be observed. The petitioner submitted that immediately prior to the coming into effect of the RHC, the practice in the courts relating to probate and administration was governed by the Probate and Administration Rules 1961 ('the 1961 rules') and by r. 6(2) thereunder, an application for resealing could be made by way of a petition naming an attorney as a petitioner. This contention was proffered despite the fact that the 1961 rules were repealed by O. 93 r. 1(b) of the RHC.

Additionally, r. 39(1) of the Non-Contentious Probate Rules 1987 of UK which allows an attorney to apply for the resealing of a grant was referred to. The petitioner also relied on Form 168 of the RHC which purportedly allows an application for resealing to be made in the manner prescribed by the petitioner.

The Deputy Registrar dismissed the petition and this was the consequent appeal.

Held:

[1] Many provisions in the Non-Contentious Probate Rules 1987 of UK were incorporated into O. 71 of the RHC. However, r. 39 was not one of those included. Neither was r. 6(2) of the 1961 rules included. Thus, the position in Malaysia is to be differentiated from the position in the United Kingdom.

[2] Probate actions should comply with O. 71 and O. 72 of the RHC. Therefore, the practice of filing a petition in the name of the petitioner cannot be right as r. 6 of the 1961 rules has been repealed and r. 39(1) of the Non-Contentious Probate Rules 1987 of England was not incorporated into O. 71 of the RHC.

[3] Where no substantive power is provided under the RHC, then Form 168 cannot purport to confer such power. Thus, if a power allowing someone else authorised in writing to apply on the executrix's behalf is excluded from the RHC, then to proceed under Form 168 as if such a power existed cannot be right.

[4] The 1961 rules have been repealed but if there remains in Form 168 a right to make such an application for resealing when the rule giving that right has been repealed, then Form 168 has to be varied correspondingly in accordance with O. 1 r. 7 of the RHC.

[5] Until and unless the rules committee reinstates the provision giving the right to the attorney to make this application on his behalf, the petitioner must commence this petition in the executrix's name.

[6] The law applicable where a power of attorney is created between a donor and donee is that of principal and agent. The title to an action brought by an attorney on behalf of his principal should not indicate the existence of the power of attorney.

[7] An attorney may affirm an affidavit verifying a petition only if the power of attorney is wide enough to enable him to do so and where no personal knowledge is required.

[8] The petitioner in this case may affirm the affidavit verifying the petition on behalf of the executrix as the power of attorney is wide enough to authorise the attorney to sign the affidavit on the executrix's behalf and the statements in the petition may be verified by official documents and therefore do not require the personal skill and knowledge of the attorney.

Per curiam:

[1] An application under O. 71 r. 26 of the RHC is concerned with the issuance of a limited grant to the attorney as an administrator. The difference between an application for resealing and an application under O. 71 r. 26 is that the court need not issue a grant in the case of an application for resealing. The original grant, upon being resealed, will enable the administration of the deceased's estate in Malaysia. In the case of an O. 71 r. 26 application however, a limited grant of letters of administration has to be issued.

[Order set aside; amended petition to be filed within 14 days.]

Cases referred to:
Ahmad Salleh & Ors v. Rawang Hills Resort Sdn Bhd [1995] 4 CLJ 197 ***(foll)***
Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***
Clauss & Another v. Pir [1987] 2 All ER 752 ***(refd)***
Jackson v. John Litchfield & Sons [1881-1882] 8 LRQB 474 ***(dist)***
Re Wallace, ex p Wallace [1984] Ch D 1047 ***(refd)***
Sivarendran & Anor v. Dr Mahendran [1988] 2 MLJ 169 ***(refd)***
TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow [1996] 4 MLJ 567 ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, s. 52
Probate and Administration Rules 1961, rr. 3(1), (2), 6(1), (2), (3)
Rules of the High Court 1980, O. 1 r. 7, O. 18 r. 19, O. 71 rr. 5(1), (6), 26, O. 72, O. 92 r. 4, O. 93 r. 1(b)
Non-Contentious Probate Rules 1987 [UK], r. 39(1)

Other source referred to:
Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd edn, vol 30, p 32
Halsbury's Laws of England, vol 2(1), para 86
Probate Practice, Tristram & Cootes, 28 edn, chapter 11

For the applicant - Azhar Azizan Harun; M/s Azhar & Goh

Reported by S Dharmendran

JUDGMENT

RK Nathan J:

This is a petition for resealing a grant of probate pursuant to s. 52 of the Probate and Administration Act 1959 (the Act). Section 52 of the Act reads as follows:

> 52. Where a Court of Probate in any part of the Commonwealth has, either before or after the passing of this Act, granted probate or letters of administration in respect of the estate of a deceased person, the probate or letter of administration so granted, or a certified copy thereof, sealed with the seal of the Court granting the same, may, on being produced to and a copy thereof deposited in the High Court, be sealed with the seal of the High Court, and thereupon shall be of the like force and effect, and have the same operation in Malaysia, as if it were a grant made by the High Court:
>
> Provided that -
>
> (a) -
>
> (b) -

The two provisos are not applicable to the facts of this case.

This petition is filed in the name of "Azhar Azizan Harun sebagai wakil mutlak Eleanor Dulcie Robinson". His counsel relied on a power of attorney dated 16 January 1998 (PA) given by Eleanor Dulcie Robinson (the executrix) to Azhar Azizan Harun (the petitioner) and another person to enable the petitioner to file the petition. Paragraph 1 of the PA appoints the petitioner and allows him to "apply to the High Court of Malaya or other proper court having jurisdiction in the premises for a Resealing of the Grant of Probate of the estate of the deceased and to take all such steps as may be necessary to obtain such resealing or other lawful representation within Malaysia ... and execute all such deeds, affidavits, documents and cause papers (if any) that may legally be required for such purposes".

This petition came up for hearing before the learned Deputy Registrar (DR) on 23 July 1998. After hearing submissions, the DR was not convinced that the petition had been correctly filed. She gave an opportunity to the petitioner to amend the petition but the petitioner requested that the petition be dismissed in order that he may appeal to the judge. Hence this appeal.

The Deputy Registrar's Grounds

The DR's view was that the petition ought to have been filed in the name of "Eleanor Dulcie Robinson" as the petitioner, and that the present petitioner could sign the petition on her behalf by virtue of the PA. Briefly her reason for so doing was that there is no substantive provision in the Act or the Rules of the High Court 1980 (the RHC 1980) to allow for the filing of the petition in the manner that it was done. That being the case, Form 168 of the RHC 1980 has to be varied as stated by O. 1 r. 7 of the RHC 1980 which allows for variations as the circumstances of the particular case require. The position in Malaysia is to be differentiated from the position in the United Kingdom since the repeal of the Probate and Administration Rules 1961 (the 1961 Rules), and also because of the non-existence of r. 39(1) of the Non-Contentious Probate Rules 1987 (NCPR) of England, here in Malaysia. Rule 39(1) provides as follows:

> (1) An application under the Colonial Probates Act 1892 and 1927 for the resealing of probate or administration granted by the court of a country to which those Acts apply may be made by the person to whom the grant was made or by any person authorised in writing to apply on his behalf.

Rule 6 of the 1961 Rules provides as follows:

> 6. (1) All petitions shall, in addition to all matters required by the form prescribed under these Rules, state the names and addresses (so far as known to the petitioner) of all persons having a prior or equal right to a grant, and on what ground the petitioner claims a grant in priority to each of such persons.
>
> (2) *Where the petitioner applies as the attorney of any other person,* or for the use and benefit of an infant or person of unsound mind, or other person not qualified to obtain a grant to himself, the petition shall state with full particularity the source of the petitioner's authority, or the grounds on which he claims to be entitled to a grant for the use and benefit of such other person.
>
> (3) Where the petitioner applies as the attorney of another person, he shall be required to prove that he has deposited his power of attorney or a copy thereof in the Registry of the Supreme Court in the manner provided by the Powers of Attorney Ordinance 1949 (emphasis added)

Paragraph 2 of Form 3 of the 1961 Rules states as follows:

> That the petitioner claims to represent the said deceased on the ground that -
>
> (a) -
>
> or (b) -
>
> or (c) She is the duly authorised attorney of the said ..., the **executor** of the said administrator deceased, duly appointed as aforesaid.

Strict Compliance With O. 71 Of The RHC 1980

There are many provisions in the NCPR which had been incorporated into O. 71 of the RHC 1980. However, r. 39 is not one of those rules included. Neither is the first part of the r. 6(2) of the 1961 Rules included. Where no substantive power is provided under the RHC 1980 or the Act, then Form 168 cannot purport to confer such a power.

Counsel for the petitioner has referred to the Supreme Court decision of *Sivarendran & Anor v. Dr. Mahendran* [1988] 2 MLJ 169 where the court emphasised that "probate actions whether contentious or non-contentious, should comply with O. 71 and O. 72 of the RHC 1980".

To my mind, it goes without saying that the decision of the Supreme Court must be complied with. That being the case, if such a power allowing someone else authorised in writing to apply on the executrix's behalf is excluded from the RHC 1980, then to proceed under Form 168 as if such a power existed cannot be right.

Practice Direction No. 4 of 1981, states as follows:

> Your attention is drawn to O. 71 of the Rules of the High Court 1980 and the forms thereto. It should be noted that the rules do not provide for notice of hearing of the petition as was to be found in r. 26 of the Probate and Administration Rules 1961 and form 8 thereto.
>
> However it appears that some registries still continue to require that the notice of hearing of petition under the repealed r. 26 be filed in non-contentious probate proceedings. This practice is not correct.
>
> 3. The Hon. the Chief Justice directs that it is not necessary for the notice of hearing to be filed. It is sufficient that the date of hearing is endorsed on the petition. If the date of hearing is changed, the new date may be notified by letter.

By the same token, the practice of filing of the petition in the name of the petitioner cannot be right as r. 6 of the 1961 Rules has been repealed and r. 39(1) of the NCPR was not incorporated into O. 71 of the RHC 1980. Counsel for the petitioner submitted that immediately prior to the coming into effect of the RHC 1980, the practice in our courts relating to probate and administration was governed by the Probate and Administration Rules 1961 (the 1961 Rules). The 1961 Rules were repealed by O. 93 r. (1)(b) of the RHC 1980 and hence ceased to be of effect as of 1 June 1980. Counsel for the petitioner further submitted that by r. 3(1) and (2) of the 1961 Rules, an application for probate and letters of administration or for resealing thereof may be made at the Principal Registry and all such applications shall be made

by way of petition in form 1, 2 or 3 prescribed therein. He elaborated on the forms and stated that in cases where the petitioner applied as the attorney of another person, specific requirements were made in r. 6(2) and (3) thereof. The form of petition for resealing was prescribed in Form No. 3 in the 1961 Rules. This form contained three versions of para. 2 to cater for different circumstances one of which includes a situation where the petitioner is an authorised attorney of the executor or administrator. Counsel therefore concluded that in view of the absence of any specific provision relating to an application for resealing in the RHC 1980, as was provided for in the 1961 Rules, then "the procedure in our courts relating to the same should be as nearly like they can be to analogous proceedings before the RHC 1980 and that would mean that an application of this nature could now be made by way of a petition and naming an attorney as the petitioner".

Reliance On Repealed Law Cannot Be Upheld

This is where the DR disagreed with the learned counsel. The DR was of the view that provisions of the repealed 1961 Rules if not incorporated in the RHC 1980 cannot continue to apply, and that the procedure in England cannot apply in Malaysia due to the absence of r. 39 of the NCPR. The case of *Jackson* can easily be distinguished from the facts of this case. In that case the common law principles were never excluded from the Judicature Acts but in this case the previous right to petition on someone else's behalf had been excluded from the existing legislation. The petitioner relied on the case of *Jackson v. John Litchfield & Sons* [1881-1882] 8 LRQB 474 for this proposition of the law. In that case a writ had been filed in accordance with the Judicature Orders and Rules which were then in force. The Judicature Orders and Rules did not contain a specific provision for a judgment to be entered against individual partners. The Court of Appeal noted that prior to the Judicature Orders and Rules, the common law rule applied and at common law there was no means of suing or of obtaining judgment against a firm. Brett LJ held as follows:

> I wish to state what I consider to be a canon or rule of construction for a guide in such a matter, ... that in all cases at common law, which are not provided for by the Judicature Acts, the proceedings are to be as they were before those Acts, and that in all cases within the Judicature Acts, where no special steps in proceedings are provided, the proceedings are to be as nearly like as they can be to analogous proceedings before those Acts.

In *Ahmad bin Salleh & 26 Ors v. Rawang Hills Resort Sdn Bhd* [1995] 4 CLJ 197, 203, James Foong J had occasion to discuss the law relating to power of attorney. His Lordship referred to *Halsbury's Laws of England* Vol. 2(1) para. 86 which states that the law applicable where a power of attorney is created between a donor and the donee is that of principal and agent.

Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edn. Vol. 30, p. 32 states as follows:

> Attorney. A person suing under a power of attorney on behalf of his principal sues in the name of the principal only; the title to the action should not indicate the existence of the power of attorney.

In the Courts of Judicature Act 1964 (Act 91), "action" unless the context otherwise requires, means:

> a civil proceeding commenced by writ or in such other manner as is prescribed by rules of Court, but does not include a criminal proceeding;

As the resealing action was one that was commenced by petition as is prescribed by the RHC 1980, the learned judge in *Ahmad bin Salleh* held that the title to the action should not indicate the existence of the power of attorney. I am inclined to agree with him. The 1961 Rules have been repealed but if there remains in Form 168 a right to make such an application for resealing when the rule giving that right had been repealed, then Form 168 has to be varied in accordance with O. 1 r. 7 RHC 1980.

Can Form 168 Be Varied?

At first glance one might be misled into thinking that Form 168 may not be varied by reading O. 71 r. 5(1) which provides as follows:

> Every application for a grant must be by petition in one of the forms in Form 168 and the petition must be verified by oath which must be contained in an affidavit sworn by the applicant, and supported by such other papers as the Registrar may require.

Any doubts arising as to whether Form 168 may be varied is dispelled by reading O. 1 r. 7 and O. 71 r. 5(6) of the RHC 1980 which provide as follows:

> Where an application for a grant is, for the first time, made after the lapse of 3 years from the death of the deceased, the reason for the delay in making the application must be set out in the petition.

If one looks at the intitulement to Form 168 it would also be insufficient. As counsel had rightly done in this case, he had varied the intitulement in Form 168 and has set it out in the correct manner as decided in the Court of Appeal case of *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127; [1995] 1 MLJ 457. I had in an earlier judgment of *TN Metal Industries Sdn Bhd & Ors v. Ng Pyak Yeow* [1996] 4 MLJ 567 also followed the decision of the Court of Appeal. The material part of the decision of the Court of Appeal is at p. 477 which reads as follows:

> ... an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of Court under which the Court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

Therefore, it is no answer to state that one had followed Form 168 in the RHC 1980. The intitulement in Form 168 is as follows:

> In the Estate of ... deceased

Nothing more is stated. If counsel had seen it fit to amend the intitulement to abide by the decision of the Court of Appeal, there is no reason why the body of the form should not be amended or varied to reflect the correct legal position.

An intestate estate not exceeding "ten thousand dollars" in value would not be dealt with by the High Court.

The definition of a "small estate" in 1972 was an estate not exceeding in value "ten thousand dollars".

I will deal more with the intitulement in the later part of my decision.

More importantly, if one looks at Form 168(b) para. 2 states as follows:

> The whole of the estate and effects of the deceased, movable and immovable, within the jurisdiction exclusive of what the deceased was possessed of or entitled to as a Trustee for any other person or persons, and not beneficially but without deducting anything on account of the debts due or owing from the deceased, does exceed in value ten thousand dollars to the best of the petitioner's knowledge, information and belief.

The value of "ten thousand dollars" had been in Form 168(b) since the RHC 1980 came into force on 1 June 1980. The purpose of para. 2 above is to state that the court has jurisdiction to hear the petition as the value of the estate does exceed in value "ten thousand dollars".

The Small Estate (Distribution) Act 1955 (Act 98) defines a small estate to be an estate consisting wholly or partly of immovable property situated in any state and not exceeding ten thousand dollars in total value. With effect from 23 June 1972, the Small Estates (Distribution) (Amendment and Extension) Act 1972 (Act 127) the value of a small estate was ten thousand dollars until the Small Estates (Distribution) (Amendment) Act 1977 (Act A399). Act A399 increased the value of a small estate to not exceeding twenty-five thousand ringgit with effect from 10 June 1977. By an amendment to Act 98 in 1982 the value of a small estate was again increased from not exceeding twenty-five thousand ringgit to not exceeding fifty thousand ringgit. The Small Estates

(Distribution)(Amendment) Act 1982 (Act A533) was made with retrospective effect and came into force from 18 October 1979. The last amendment to Act 98 affecting the value of a small estate came into force from 1 January 1989. As of that date a small estate was one that was defined as having a value of not exceeding six hundred thousand ringgit. The Small Estates (Distribution) (Amendment) Act 1988 (Act A702) was the last amendment. As at 1 June 1980, para. 2 of Form 168(b) of the RHC 1980 should have stated the value to be in excess of twenty-five thousand ringgit as the value of a small estate then was one not exceeding twenty-five thousand ringgit in total value. Each time the law is amended, the Forms affected by such amendments would accordingly have to be read as having been amended in like manner. Therefore it is quite clear that the collector has the jurisdiction to order distribution of a small estate.

Based on the above, I would hold that Form 168 is to be varied accordingly and that the answer that one had followed Form 168 is not the be all and end all of it all.

Application For A Limited Grant By An Attorney

I had earlier stated that I will deal further with the intitulement as set out by the petitioner and this is what I have to say. The intitulement of the petitioner also refers to O. 71 r. 26 of the RHC 1980. Order 71 r. 26 provides as follows:

> Where a person entitled to a grant resides outside Malaysia, administration may be granted to his lawfully constituted attorney for his use and benefit, limited until such person shall obtain a grant or in such other way as the Registrar may direct:
>
> Provided that the attorney must file a certified true copy of the power of attorney with the petition or prove that he has deposited it or a certified copy of it in the Registry of the High Court in the manner provided by section [4] of the Powers of Attorney Ordinance 1949;
>
> And provided that where the person so entitled is an executor, administration shall not be granted to his attorney without notice to the other executors, if any, unless such notice is dispensed with by the Registrar.

It is to be noted that r. 26 is concerned with the issuance of a limited grant to the attorney as an administrator. It is not relevant to a petition for resealing. As clearly stated in s. 52 of the Act, when the grant of probate is resealed in this case, the executrix would be able to administer the estate of the deceased in Malaysia by using the same grant that was issued to her by the High Court in the United Kingdom. The High Court here does not need to issue her with a grant. However, if the application was for a limited grant for the petitioner to administer the estate in Malaysia under O. 71 r. 26, the High Court here

would have to issue out the limited grant of letters of administration to the petitioner in the petitioner's name, in which case the petitioner would have rightly commenced the petition in his own name. A reading of Chapter 11 on Limited Grants in Tristram & Cootes, Probate Practice, twenty-eighth edition will provide much assistance for one to see the difference between an application for resealing and an application under O. 71 r. 26 of the RHC 1980.

Exercise Of Inherent Powers Of The Court

Counsel has strongly urged me to exercise the court's powers under O. 92 r. 4 of the RHC 1980 to prevent injustice. In actual fact this is what the DR had done. As the rules of procedure were silent, she tried to give effect to the provisions of s. 52 of the Act by not relying on the repealed 1961 Rules but by following general legal principles. I am of the view that her reasoning is correct. Until and unless the Rules Committee reinstates the provision giving the right to the power of attorney to make the application on his behalf, I hold that the petitioner must commence the petition in the executrix's name. I would therefore allow the petitioner to amend the petition, as under O. 18 r. 19 of the RHC 1980, the court may at any stage of the proceedings order to be amended any pleading and the court may stay the action until the amendment is made.

Whether The Petitioner May Affirm The Affidavit As An Attorney?

The attorney may affirm the affidavit verifying the petition only if the power of attorney was wide enough to enable him to do so and where no personal knowledge is required.

In *Re Wallace Ex parte Wallace* [1984] Ch. D. 1047; 14 QBD 22, a bankruptcy petition was presented by W. Richards of Prince Edward's Island, and signed "William Richards by his attorney Thomas Picton Richards". The signature was attested by a witness, and the attestation clause was as follows: "signed by the petitioner by his attorney, Thomas Picton Richards, in my presence". The power of attorney empowered T.P. Richards, on behalf of his principal "to commence and carry on, or to defend, at law or in equity, all actions, suits or other proceedings, touching anything in which I, or my ships, or other personal estate, may be in anywise concerned". The debtor appealed from the receiving order made against him on the ground that the creditor's petition was signed on his behalf by his attorney. The Court of Appeal held that a petition in bankruptcy might be signed on behalf of the petitioning creditor when the terms of the power of attorney so allowed, and that the terms of the said power of attorney were wide enough to authorise the attorney to sign a creditor's petition on behalf of his principal.

In *Clauss and Another v. Pir* [1987] 2 All ER 752 the plaintiffs and the defendant both claimed to be entitled to the grant of letters of administration in respect of the estate of the deceased, who had died intestate. The plaintiffs claimed on the basis that they were the next of kin, while the defendant claimed to be the deceased's adopted son. The plaintiffs commenced a probate action for the grant of letters of administration and in the course of that action the master ordered that the relevant documents, verified by affidavit, be served by 26 Jun 1986. Both duly served the documents by the appointed date, but the defendant's affidavit was sworn by his wife, on whom he had conferred a statutory power of attorney. The judge in his decision at p. 755 stated as follows:

> What a principal can lawfully do by an attorney is summarised in *Halbury's Laws* (4th Edn) para. 703 as follows:
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> > It may be stated as a general proposition that whatever a person has power to do himself he may do so by means of an agent. The converse proposition similarly holds good that what a person cannot do himself he cannot do by means of an agent. It is, in general, necessary to ascertain who is legally competent to act or contract in order to know who is competent to be a principal. There are, however, two exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself, and there are ...
>
> and then there is an exception where statute requires the evidence of a signature of the principal. The second exception is:
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> > Where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its exercise ...
>
> and then the paragraph goes on with an example which is not material.
>
> It appears from that passage that a party cannot do by an attorney some act the competency to do which arises by virtue of some duty of a personal nature requiring skill or discretion for its exercise.
>
> ... the obligation to swear a verifying affidavit which requires the deposing party to apply his mind to matters which are or should be within his own knowledge (and, amongst other things, to make the very important statement on oath that there are not and have not been in his possession, custody or power any documents relevant to the action apart from those which are disclosed) is a clear example of a duty of personal nature requiring skill or discretion for its exercise.

On p. 756, the learned judge held:

> ... that is a personal duty which he alone can perform because of the personal knowledge which is required. After all, he is being compelled to give a particular form of evidence and in no other field would it be possible to say that a party may give evidence through an attorney. If the obligation under O. 24 r. 3(3) must be performed personally, there is nothing in the 1971 Act (Powers of Attorney Act 1971) to change that. The order which was made by Master Munrow in this case on 29.7.86 required the defendant to serve a list of documents verified by affidavit. The requirement that he should serve his list verified by affidavit is not something which can be delegated. It required the defendant to do something personally which cannot be done by means of an attorney.

The learned judge therefore extended the time for filing the affidavit verifying the documents and ordered the principal to affirm the affidavit personally.

Having perused the power of attorney and the statements in the petition in this case, I would hold that the petitioner may affirm the affidavit verifying the petition on behalf of the executrix, as the power of attorney is wide enough to authorise the attorney to sign the affidavit on the executrix's behalf and the statements in the petition may be verified by official documents and therefore do not require the personal skill and knowledge of the attorney.

I therefore set aside the order of the DR and order that an amended petition be filed within fourteen days from the date of this decision failing which the petition do stand dismissed with costs. The amended petition shall be fixed and heard by the Deputy Registrar as is the usual practice. The costs of this appeal shall be taxed and be paid out of the estate of the deceased.